IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

PILCHUCK CONTRACTORS, INC., Petitioner, v. MICHAEL T. AUSTIN and STATE OF WASHINGTON, DEPARTMENTOF LABOR AND INDUSTRIES, Respondents.	)	No. 66973-7-I UNPUBLISHED OPINION FILED: November 5, 2012

SPEARMAN, A.C.J. — Following an appeal to the superior court from a Board of Industrial Insurance Appeals (Board) decision affirming Michael Austin's workers' compensation claim, a jury entered a verdict finding that the Board incorrectly determined that Austin suffered an industrial injury resulting in conditions in his low back and left knee. Austin appeals, arguing that the trial court misstated the law in the verdict form and abused its discretion in denying his motion for a new trial based on an erroneous verdict form and misconduct of the attorney representing the Department of Labor & Industries (Department). We affirm and deny his request for attorney fees.

FACTS

Michael Austin filed a claim for workers' compensation benefits for an injury to his left knee and low back occurring on November 29, 2007, while he was working as a flagger for Pilchuck Contractors, Inc. The Department allowed

the claim and provided benefits. Pilchuck appealed to the Board. The industrial appeals judge issued a proposed decision and order affirming the Department's order. After the Board denied Pilchuck's petition for review, Pilchuck appealed to the King County Superior Court.

Prior to trial, counsel for the Department informed the court that the Department intended to take "a neutral role with respect to this case because of some new evidence . . . ." She stated that she may not make an opening statement or closing argument. Austin and the Department were named defendants at trial and shared time during rounds of voir dire. Counsel for the Department gave an opening statement but did not make a closing argument.

At trial, the testimony and depositions from the Board proceedings were read to the jury. After the close of evidence and outside the presence of the jury, the court considered proposed jury instructions. Austin proposed a verdict form asking, "Whether the Board was correct when it found that Mr. Austin sustained an industrial injury on November 29, 2007?" Pilchuck proposed: "Was the Board of Industrial Insurance Appeals correct in deciding that Mr. Austin's conditions diagnosed as lumbar sprain/strain and left knee contusion were proximately caused by a November 29, 2007 industrial injury?" The trial court chose Pilchuck's proposed verdict form. Austin excepted, arguing that his proposed question "used more general language and didn't get into the specific diagnoses based on the medical testimony that was presented, but we feel that the jury does not need to necessarily find these specific diagnoses but could find just

general low back and left knee injuries." After closing arguments and deliberations, the jury answered the verdict question, "No."

Austin filed a motion for a new trial, arguing that the conduct of the Department's attorney was misleading and that the verdict form was confusing and misleading. In particular, Austin claimed he was prejudiced by counsel for the Department "physically aligning herself with the employer," that is, sitting at the counsel table next to Pilchuck's attorney, "despite stating her intention to be a neutral party and being a named defendant." Austin argued that the verdict form was misleading because the jury was not allowed to consider the injuries separately. He claimed the verdict form should have asked generally whether he sustained an industrial injury or, in the alternative, asked two separate questions so that the jury could consider whether he sustained either injury.

Pilchuck responded to the motion and included a declaration of its attorney describing the seating arrangement of counsel at trial. According to the declaration, the counsel tables were situated in an L-shaped pattern, Austin's attorney faced the jury, Pilchuck's attorney faced the bench, and the Department's attorney sat between the other two. The Department also responded with a declaration of its attorney. The Department's attorney stated that she sat at the table facing the bench in the chair closest to Austin's attorney, except during voir dire, when she sat with Austin's attorney at the end of her table with their backs to the judge. According to the Department's attorney, Austin's attorney first mentioned the seating arrangement on the third and final

day of trial just before closing argument when she asked counsel for the Department to move to her table. Following a hearing without oral argument, the trial court denied the motion for a new trial.

Austin appeals.

DISCUSSION

For the first time on appeal, and relying only on RCW 51.32.010 and the pattern jury instructions, Austin contends that the trial court erred as a matter of law by giving the jury a verdict form that did not allow consideration of each condition resulting from his industrial injury individually.

Jury instructions must permit each party to argue its theory of the case, must not be misleading, and when read as a whole must properly inform the jury of the applicable law. Leeper v. Dep't of Labor and Indus., 123 Wn.2d 803, 809, 827 P.2d 507 (1994). A trial court's decision to give a jury instruction is reviewed de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact. Kappelman v. Lutz, 167 Wn.2d 1, 6, 217 P.3d 286 (2009).

RCW 51.32.010 provides in pertinent part:

> **Who entitled to compensation**.
>
> Each worker injured in the course of his or her employment … shall receive compensation in accordance with this chapter, and, except as in this title otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever[.]

The sample special verdict form in the pattern jury instructions suggests an

interrogatory to the jury "summarizing the ultimate conclusions of the Board of Industrial Insurance Appeals." 6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS CIVIL 155.14 at 169 (6TH ed 2012) (WPI). Austin claims that the statute does not require an injured worker to prove entitlements to benefits on more than one injury and that the instruction does not require an exact recitation of the Board's conclusion.

As Pilchuck and the Department point out, Austin did not contend that the verdict form misstated the law either at trial or in his motion for a new trial. Although he proposed a general verdict form that did not list the two conditions, he did not argue that the conditions should be stated in the disjunctive or request a separate question for each condition. His sole argument in his exception to the verdict form at trial was that it need not list the specific diagnoses. In the motion for a new trial, he claimed that the verdict form was misleading but did not claim that it misstated the law. Austin fails to argue or establish that he is entitled to raise this claim of error for the first time on appeal. See RAP 2.5(a).

Moreover, Austin cannot demonstrate a misstatement of law in the verdict form. Austin fails to cite any relevant authority for the proposition that where the Board has approved benefits for a single industrial injury resulting in two conditions, a jury must be asked to rule on the two conditions separately. Contrary to Austin's unsupported claims, RCW 51.32.010 and the pattern jury instructions state no such rule. And rather than instructing the jury on the law,

the verdict form constitutes a factual description of the Board's conclusion. Whether the verdict form accurately states the Board's conclusion is a question of fact. Austin does not argue or establish that the summary of the Board's conclusion in the verdict form is factually inaccurate. Under these circumstances, we review the trial court's decision to use the particular verdict form here for abuse of discretion.

Austin does not assign error to any statement of the law in the jury instructions and does not contend that the jury instructions as a whole failed to properly inform the jury of the law. Austin argues only that the verdict form was misleading and prevented him from arguing his theory of the case because it did "not [allow] the jury to consider each injury separately."

The court instructed the jury that the Board made the following material finding of fact: "Austin suffered an industrial injury while lifting a traffic sign in the course of his employment with Pilchuck Contractors, Inc." on "November 29, 2007" resulting in "a lumbar sprain/strain and left knee contusion." The court also instructed the jury that the Board's findings and decision should be presumed correct unless Pilchuck established by a preponderance of the evidence that the decision was incorrect.

Pilchuck's theory of the case was that the events Austin reported on November 29, 2007, did not occur, or, if the events occurred as he described, that he experienced no change in the condition of his low back and left knee as a result. Austin's theory of the case was that the Board correctly found that he

was injured on November 29 and that he sustained resulting conditions in his low back and left knee. Nothing in the record indicates that Austin had any other theory of the case. Austin does not now articulate any other theory supported by the evidence that he would have argued if the verdict form had stated the resulting conditions in the disjunctive or listed the conditions in separate questions. We also reject his bald assertion that the verdict form was misleading. The trial court did not abuse its discretion.

Austin next argues that the trial court abused its discretion by denying his motion for a new trial based on the conduct of the Department's attorney. We review a trial court decision on a motion for a new trial for abuse of discretion. Aluminum Co. of America v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000). To prevail in a motion for a new trial based on misconduct of counsel in a civil trial, the moving party must demonstrate prejudicial misconduct, to which the moving party properly objected at trial, and which could not have been cured by an instruction to the jury. Id. at 538-39.

Austin claims that a new trial is necessary because the Department's attorney submitted jury instructions contradicting those proposed by his attorney, physically aligned herself with Pilchuck's attorney, and refused to change positions. Without citation to relevant authority, Austin claims that these actions were improper because they were not consistent with neutrality, confused at least one juror, and created a risk of prejudice.

But the Department's position on the proposed instructions could not

have affected the jury's view of the case because the parties submitted and discussed jury instructions outside of the presence of the jury. And Austin did not object to the physical position of the Department's attorney at trial. Austin does not claim or establish that any risk of prejudice based on the seating arrangement could not have been cured by an instruction to the jury. The trial court instructed the jury to decide the facts of the case based on the evidence presented at trial, specifically, "the testimony of the witnesses which has been read to you from the certified Appeal Board record and any exhibits I have admitted into evidence." Juries are presumed to follow the court's instructions. A.C. ex rel. Cooper v. Bellingham School Dist., 125 Wn. App. 511, 521-22, 105 P.3d 400 (2004). Finally, the trial judge, who was in the best position to determine whether the seating arrangement created a risk of prejudice, concluded that a new trial was not necessary. See Rich v. Starczweski, 29 Wn. App. 244, 628 P.2d 831 (1981) (trial judge is in best position to determine whether inadvertent mention of improper evidence deprived party of a fair trial). Under these circumstances, Austin fails to establish any abuse of discretion.

Austin requests attorney fees under RCW 51.52.130 to the extent he is successful in his appeal. Because Austin has not prevailed, he is not entitled to an award of attorney fees.

Affirmed.

FOR THE COURT:

Spearman, A.C.J.

Grosse, J.

Becker, J.